In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

WILLIAM A. WAREHIME, d.b.a.
NEZEN MILK FOOD COMPANY, *et al.*,
Petitioners,

vs.

H. H. VARNEY, MILK MARKET AGENT,
WAR FOOD ADMINISTRATION, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Report of Opinion Below.

The opinion of the Circuit Court of Appeals is officially reported in 147 F. (2d) 238.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Court, as amended by the Act of February 13, 1925.

Statement of the Case.

The pertinent facts are stated in the foregoing petition (pages 7-13).

Specification of Errors.

The specification of Errors is set forth in the foregoing petition at page 13.

ARGUMENT.

I. THE SECOND WAR POWERS ACT DOES NOT DELEGATE TO THE WAR FOOD ADMINISTRATOR AUTHORITY TO REQUIRE PAYMENT OF THE ASSESSMENT THREATENED TO BE IMPOSED AGAINST PETITIONERS, AND FOOD DISTRIBUTION ORDERS 79 AND 79-3 ARE TO THAT EXTENT INVALID AND UNCONSTITUTIONAL.

A. The Act does not contain any express delegation of power to exact an assessment.

Defendants do not claim any such express authority, and rely entirely on the language in the Act "* * * in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate * * *." Title III, Second War Powers Act, 1942, Sec. 2(a)(21).

B. The Act does not impliedly or inferentially delegate authority to enact an assessment "to meet the expenses which the Director finds will be necessarily incurred by the operations of this order."

1. Congressional care in providing for detailed incidental powers negatives an intent to delegate by complete silence such a far-reaching, unrelated and non-incidental power as that of self-financing.

An examination of the Second War Powers Act, Title III, indisputably discloses that Congress made no express delegation of power to promulgate an assessment-levying regulation. It is to be assumed that such a far-reaching power would have been mentioned and expressly provided for had it been intended. It is observed that Congress expressly provided for a great enumeration of incidental and enforcement-aiding powers (Sections 2(a), (3) and (4)) which might well have been implied and inferred as properly incident to the general power of allocating scarce materials, yet Congress provided for them in detail. Congress took care (Section 2(a) (8)) to authorize redelegation of

authority by the President. Congress (Sections 2 through 14, inclusive) provided a great mass of detail for guidance and limitation in administering the powers conferred, such as powers of subpoena, requiring the keeping of records, making reports, etc. set forth in subsection 2(a), (3) and (4) of the Act and even specifying hours and wages. That Congress was not unmindful of even incidental financial considerations is further evidenced by requiring a profit limitation on war contracts (Section 2(b)). It is not conceivable that Congress intended to grant any such basic, non-incidental power as that of levying a self-supporting assessment by complete silence when it provided in such extensive and minute detail for other far less important and less far-reaching incidental powers. To imply any such grant of power from the Second War Powers Act is to disregard the nature and form of the Act, and the apparent care with which Congress acted in expressing its intent in matters of detail and incidental powers. Such implication of grant of power further disregards the legislative history of such power delegation apparent in the very absence of its use by Congress. It is not to be inferred that Congress here intended by silence to grant a power so seldom granted before, and then only by express provision with one or two possible exceptions where a power of regulatory (not mere self-financing) assessment was found implied. Diligent search by counsel fails to find a single precedent where an administrative agency even assumed it had or exercised any such implied power of pure self-financing divorced from regulatory mode or licensing. Counsel for respondents have suggested no such precedent. We deem this lack of precedent highly persuasive if not determinative of the lack of such power by implication. Certainly it is clear that, giving due weight to these considerations, it is a misconstruction of the intent of Congress to enlarge by inference and implication the provisions of the Second War Powers Act to include the delegation of authority to levy

and collect an assessment to meet the expenses of administration. This is adequately demonstrated by Congress itself. Upon learning of the attempt of the War Food Administrator to levy and collect the assessment objected to, Congress immediately, in effect, prohibited such assessment (Public Law 367, 78th Cong., Ch. 296, 2d session). (FDO 79 was amended June 21, 1944, eliminating the assessment provisions here contested (9 F. R. 6982)). We conceive of no possible basis for implying the delegation of such assessment power except the complete failure to provide for administration from public funds and thus rendering a delegation of administrative enforcement of legislative policy a nullity in the absence of the power of self-financing. That no such situation exists here is attested by the fact that FDO 79 has been in operative effect and enforced by use of public funds since June 21, 1944, without an assessment provision in the Order. We conclude that there was no need for such power and that Congress intended no such power. We submit that finding such power in the Second War Powers Act is erroneous and contrary to its provisions and congressional intent.

Furthermore, that portion of the Second War Powers Act (Section 2(a)(21)) particularly relied upon by respondents provides the nature and subject matter of permitted regulation. The imposing of an assessment to cover expenses of operation is not included in its provisions and must thus be deemed excluded by congressional intendment. Such congressional expression of intent ought not to be nullified by implying or inferring the existence of the disputed power. The Act provides that:

> "* * * the President may *allocate such material or facilities in such manner, upon such conditions and to such extent* as he shall deem necessary or appropriate in the public interest and to promote the national defense." (Emphasis supplied.)

It is not disputed that the subject matter of permissible regulation is allocation, or rationing of essential materials and facilities, including milk and its handling. Such regulation may establish the *manner* of allocation. It cannot be claimed that the imposition of the contested assessment is a manner, method or mode of regulation. Its stated purpose is otherwise as hereinbefore pointed out. Or such regulation may establish the *conditions* upon which allocation will be made. Obviously the assessment sought to be imposed is not such a condition. Handling milk is not made conditional or contingent upon payment of a license fee. *Conditions* must be taken to mean those matters affecting discretion as to the distribution of rationed materials, such as normal or extraordinary need or qualification for receiving such scarce materials. Or such regulation may prescribe the *extent* of allocation. Milk handlers' quotas are clearly not fixed by the assessment. Rather the assessment is dependent upon the milk actually handled. Neither do we find any apparent connection between the assessment and the public interest or national defense.

2. *The Second War Powers Act is entirely dissimilar to milk industry Codes and similar assessment powers may not be implied.*

The Circuit Court of Appeals in its opinion (R. 128) points out that the milk industry has long been the subject of legislation and many state codes applicable to it have been adopted, citing *Nebbia v. People of New York*, 391 U. S. 502, which reviews much of such legislation. We respectfully point out, however, that such fact has no bearing upon and is not a precedent in the question at issue. In the first place, such codes are direct and not delegated legislative enactments. The fees and assessments therein imposed are specifically established by the legislature in amount, or the standards and limitations of the amount to

be determined and assessed by the administrative agency as well as the authority to make such determination and assessment are specifically prescribed by the legislature. It is clear that the Second War Powers Act contains no similar provision. In the second place, such legislation is a police power regulation of an industry deemed necessary for health and public welfare. It is milk regulatory legislation. The Second War Powers Act is not claimed to be such type of legislation. It is clearly a war emergency measure and is a war power enactment in the interest of promoting national defense on the home and battle fronts. It is not an industry police power regulation but a war material supply and allocation enactment. There is no basic governmental authority relationship between the two types of legislation. Furthermore, milk industry police power regulation is a right of the State governments. On such basis the Federal Government is without regulatory authority and apart from the power to regulate interstate commerce, the war power or similar Constitutional authority, is without power to so regulate the milk or other industry. See *United States v. Butler*, 297 U. S. 1 and *Rickert Rice Mills v. Fontenot*, 297 U. S. 110. Such was not deviated from in the later decision in *United States v. Rock Royal Corp.*, 307 U. S. 533, *Hood & Sons v. United States*, 307 U. S. 588, and *Wrightwood Dairy Co. v. United States*, 315 U. S. 110. We may thus conclude that milk industry police power regulation does not afford any basis or precedent in the issue before us, and does not serve as any authority for interpretative enlargement of the provisions of the Second War Powers Act. The two types of legislation are totally different both as to authority basis and purpose. The normal incidents of one are not to be imputed to the other.

3. The Agricultural Marketing Agreement Act of 1937 serves as no precedent in the implication of powers intended in the Second War Powers Act.

In the lower courts, counsel for respondents placed great reliance upon three decisions of the United States Supreme Court, namely, *United States v. Rock Royal Corp.*, 307 U. S. 533 (1939), *Hood & Sons v. United States*, 307 U. S. 588 (1939), and *United States v. Wrightwood Dairy Co.*, 315 U. S. 110 (1942). These decisions by a divided court sustained the Agricultural Marketing Agreement Act of 1937 as a proper exercise by Congress of the power to regulate the price of milk insofar as it affected *interstate commerce*. The issues there involved are not pertinent to this case and we need not inquire into the validity of that legislation. There the authority to control prices through the medium of pool payment assessments, and then only after obtaining a majority consent by referendum of those sought to be charged, was specifically enacted, and the manner and procedure largely determined by Congress itself. Administrative detail only was delegated to the administrative agency in the opinion of the Court.

Here we are confronted with an attempt by an administrative agency to usurp unto itself the taxing power without a shred of delegated authority. There is no analogy whatsoever between the cases cited and the instant case.

4. The assessment objected to cannot be sustained as an implied license charge.

The instant case is to be distinguished from those involving legislation of a licensing nature, wherein one is permitted to engage in an undertaking, presumably for personal profit, subject to government sanction, control and regulation, where from the subject matter, the existing conditions and circumstances or the privilege conferred,

it may be reasonably and normally anticipated or inferred that some cost covering fee or assessment will be enacted. See *Hamilton v. Dillon*, 88 U. S. 73 and *Morgan v. Louisiana*, 118 U. S. 455. It is to be noted that petitioners are engaged in a long established industry. Continued operation is essential in times of war and peace. No special favor or dispensation is offered for which compensation by license fee or assessment would be in normal expectation or implication. It is to the interest of the government and the public as well as to petitioners to encourage and promote their operation rather than to discourage or impede it by exacting a license or privilege charge. It seems clear that Congress in the Second War Powers Act expressed such view by carefully not providing for any licensing system as distinguished from its including such power in another war emergency enactment—the Emergency Price Control Act. Such differentiation in treatment and purpose, as well as the fact that the licensing power has been seldom and sparingly used by Congress, was carefully noted by the Supreme Court but recently (May 22, 1944) in *Stewart & Bros. v. Bowles*, 322 U. S. 398. Upon this basis of consideration it must be concluded that all normal and reasonable implications strongly negative rather than support the assessment under scrutiny.

5. The assessment in issue is not a mode of regulation.

It is equally clear that the subject assessment is necessarily distinguished from those types of regulation where the enactment of a fee or charge is an ordinary, normal and anticipated method, means or mode of regulation. See the *Head Money Cases* (*Edge v. Robertson*), 112 U. S. 580, *United States v. Grimaud*, 220 U. S. 506, and Twin City *National Bank v. Nebeker*, 167 U. S. 196. It is so clear as to need no argument that the present assessment at issue is not designed, calculated or in fact such a regulatory measure. Its purpose as specifically set forth (FDO 79, Sec-

tion 4) is "to meet the expenses which the Director finds will be necessarily incurred by the operations of this order." It is thus a necessary conclusion that this assessment is not a regulatory mode of the type under discussion, and that cases dealing with such type of regulations afford no precedent or support for its validity.

6. The type of assessment in issue is foreign to our normal and customary governmental procedures, and authority to impose such an assessment ought not to be lightly implied from a strained and indefinite congressional intent reposing wholly in silence.

Administrative assessments for operating expenses are contrary to our accepted and cherished governmental practices and precepts. Over the years, and based upon experience, there has been developed a Bureau of the Budget to scan appropriation requests and assure the careful and efficient use of public funds. If administrative agencies are to be permitted to finance themselves this safeguard is of no effect and can be evaded. The nature and extent of administrative execution of delegated congressional policy is subject to continued surveillance by Congress and can be reviewed and partially controlled through appropriation of public funds, as witness the debate and consideration in respect to the Office of Price Administration in the Spring of 1944. Such control is sacrificed and Congress may be ignored in this respect should assessments of the type here involved be permitted. An unfair and unreasonable burden of governmental expense would be placed by such assessments upon a limited class. It cannot be doubted that the benefits of such regulation as here involved inures primarily if not entirely to the benefit of the public. The cost of securing such benefit should be shared by the public through the use of public funds, and not be imposed upon a small class receiving little if any special benefit. With as much or more reason such cost of operation might be

imposed upon milk consumers rather than handlers. Such determinations are matters of substantial and basic policy and are appropriate only for congressional action, as contemplated by our Constitution. If chaos is to be avoided the over-all government financing problem should be considered as a whole—by Congress—and the public should not be subjected to unrelated, overlapping and confusing administrative assessments as would be bound to result were assessments of the type here involved permitted. This is a part of the over-all war program. Congress has procured by taxation and borrowing many billions of dollars and appropriated such sums to finance our gigantic war undertaking. It is hardly conceivable that it was intended that this agency was to be granted a special, added fund-raising power of its own. This assessment is contrary to our principle of government. It is the hole in the dike which must be plugged. This pernicious attempt at usurped power must be thwarted in order that it does not spread far afield and destroy our constitutional government. A decision so momentous should not be found through implication from congressional silence. Such finding of assessing power should be made only from the clearest of congressional pronouncements.

II. THE POWER TO EXACT THE ASSESSMENT IN ISSUE, IF IMPLIED, WOULD RESULT IN AN INVALID AND UNCONSTITUTIONAL DELEGATION OF LEGISLATVE AUTHORITY.

A. Determination of the method of financing the cost of governmental regulation is an exclusive power of Congress.

Statutes and judicial decisions are numerous on the question of financing the regulation of matters in which the public and the parties regulated are equally interested. In its opinion (R. 129), the Circuit Court of Appeals found the subject regulation to be one of such blended interest,

and that the law there applicable was that the "*imposition of costs on individuals or on the state or apportionment between them is a matter of congressional or legislative discretion.*" (Emphasis supplied.) We are wholly in accord with this view and are happy to adopt the Circuit Court's language. We believe that such view is determinative of the issue in question and conclusive of the invalidity of the assessment provision contested. Such determination of policy as to the method of providing for the expenses of regulation is fundamental and reposes exclusively in the legislative branch of the government. If not an integral part of the taxing power and authority, it is so closely allied and related as to be separated only by highly artificial technicality. Such matter of basic legislative policy and discretion is a power which cannot be delegated by Congress. Clearly, Congress and no other governmental branch or agency is bound to determine the policy as to mode of financing governmental operations. To attempt to do otherwise is to directly violate the constitutional provisions relative to legislative responsibility and separation of powers. It is equally clear that the Second War Powers Act does not exercise this discretion and does not provide any determination of such basic policy. It is apparent that in the absence of the assessment provisions contested the expenses of carrying into effect FDO 79 and 79-3 would be wholly borne by the government or public. The effect of the assessment provisions—determined upon and promulgated by the War Food Administrator and not by Congress —if valid, would be to impose such expense on the individuals regulated, or at the least would result in an apportionment of the expenses. Thus, it is obvious that the determination of whether to have or not to have such an assessment is in fact and in effect a determination of the discretion and policy as to the imposition of the costs of regulation. That, as the lower court aptly pointed out, is a matter for congressional determination. The War Food

Administrator by an attempted usurpation of such legislative authority purported to require by assessment the imposition of the costs of regulation upon petitioners and other milk handlers. As a consequence, we submit that such assessment provisions are contrary to Article I, Section 1 of the Constitution of the United States and accordingly invalid.

Even were it considered that Congress had authorized by implication the imposition of an assessment upon milk handlers such attempted delegation of authority would be fatally defective. In the first place, such authority would result in transferring to the War Food Administrator legislative discretion since it cannot be contended that the Second War Powers Act makes such an assessment mandatory. The very act of making the assessment requirement is the exercise of legislative discretion as to the policy of financing.

B. The claimed power is invalid because of indefiniteness and the lack of any standard, limitation or guidance for administrative application.

A delegation of power such as is claimed by respondents, which is without standards, limitations, bounds or policy or guidance in execution is invalid as a delegation of exclusive legislative function rather than of administrative detail in putting legislative policy into operation.

> "A statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers. The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion." 42 *Am. Jur.* 343, Sec. 45. See *Schechter v. U. S.*, 295 U. S. 495, 79 L. ed. 1570; *Panama Ref. Co. v. Ryan,* 293 U. S. 388, 79 L. ed. 446; *J. W. Hampton & Co. v. U. S.*, 276 U. S. 394, 72 L. ed. 624; *Yick Wo v. Hopkins,* 118 U. S. 356; 30 L. ed. 220.

The Second War Powers Act does not provide a single guide or standard as to the imposition of any assessments. There is no requirement of reasonableness either in respect to assessment or expense. In the assessment provision of FDO 79, the *War Food Administrator* sets a limit of three cents per hundred weight of milk handled, but a charge of thirty cents or three dollars or even more may be made tomorrow if the Administrator himself so chooses. It is no answer to say the present assessment is reasonable (if such were true). The fact remains that the power claimed is unlimited and if the power claimed should exist at all, there is in fact, no limitation on it in the Second War Powers Act and here certainly would be an unconfined and vagrant delegation of legislative authority.

> "Although there is no standard, definite or even approximate, to which legislation must conform, 'it is not validly enacted where it produces a delegation of legislative authority which is unconfined, vagrant and not canalized within banks to keep it from overflowing'." 11 *Am. Jur.* 957, Sec. 240. See, *Schechter v. U. S.*, 295 U. S. 495; 79 L. ed. 1570; 55 S. Ct. 837; 97 A. L. R. 947; *Panama Ref. Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; *Portland v. Welch*, 154 Or. 286, 59 P. (2) 228, 106 A. L. R. 1188.

It is noted that the Circuit Court referred in its opinion (R. 129) to the limiting of assessments to expenses, but this too is a limitation imposed by the regulation itself and not by Congress. Such limitation by the regulation cannot validate a delegation of power otherwise invalid for indefiniteness and lack of declared policy. See 42 *Am. Jur.* 343, Sec. 45, *supra.*

C. The assessment in issue is a revenue-raising tax, and Congress may not delegate the power to determine the imposition thereof.

Certain fundamentals of our constitutional form of government which have never been seriously questioned are

directly violated and attempted to be nullified by the assessment provision of FDO 79 challenged by petitioners. Article I of the United States Constitution has long been understood to vest and establish beyond argument the legislative powers of the federal government exclusively in the Congress (Section 1), and specifically vesting in Congress the power to levy and collect taxes. (Section 8)

> "* * * it is universally recognized that in distribution of the powers of government in this country into three departments, namely, legislative, executive, and judicial, the power of taxation is peculiarly and exclusively legislative and consequently falls to the legislature." 51 *Am. Jur.* 71, Sec. 42 and cases cited.

In the assessment provisions of FDO 79 respondents would usurp unto the War Food Administrator the legislative power of Congress exclusively to lay and collect taxes.

It is clear that the assessment provision objected to is a tax pure and simple, designed solely for the purpose of raising revenue to pay expenses of governmental operation. The multitude of judicial decisions defining a tax are perhaps best condensed and summarized as follows in 51 *Am. Jur.* 35, Sec. 3:

> "A tax is a forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction, to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses."

Food Distribution Order 79 (R. 7-10) provides in part as follows:

> "Section (c) (2) (vi). Collect the assessments as provided in this order from handlers required to pay such assessments;
>
> "Section (c) (2) (xii). Pay out of the funds collected by him as market agent the cost of his bond and of the bonds of his employees, his own compensation

and that of his employees, and all other expenses necessarily incurred by him in the performance of his duties hereunder;

"Section (c) (4). Each handler shall pay the market agent, within 20 days after the close of each calendar month, after the date of appointment of the market agent, an assessment upon the milk, milk byproducts, and cream, or any such portion thereof as may be specified by the Director, delivered by such handler during each such calendar month. This assessment shall be fixed, and may be modified from time to time, by the Director *to meet the expenses which the Director finds will be necessarily incurred by the operations of this order* in connection with an order issued pursuant hereto by the Director: Provided, however, That the assessment shall not exceed $0.03 per hundredweight of milk, milk equivalent of cream, and skim milk equivalent of milk byproducts." (Emphasis supplied.)

It is thus abundantly clear from the express provisions of the Order pointed out above, and which are contested in this action, that the only purpose of such assessments is to finance the administrative agency and thereby largely place such agency beyond Congressional control and direction. Were such procedure to be sanctioned the exclusive power of Congress to tax would be a thing of the past and our Constitutional foundations undermined and direct governmental responsibility to the public seriously weakened. The attempted usurpation of taxing power here contested represents the most flagrant, deliberate and uncamouflaged attack upon our cherished rights protected by our Constitution that has come to our attention.

This type of revenue-raising charge to which we vehemently object is to be carefully distinguished from the totally different charges which Congress has authorized administrative agencies to make as a regulatory method in connection with permissible control over interstate commerce, immigration, public lands and like subjects. In such cases the charge is one of the means of regulation, which is the

primary purpose, and revenue resulting therefrom is merely incidental. Even in such cases the Congressional intent has been carefully inquired into. See the *Head Money Cases* and *United States v. Grimaud* hereinbefore discussed. In the instant case there is no attempt to disguise the assessment as a regulatory means, and it is clear that it is not. This is a clear violation of every Constitutional provision and safeguard pertaining to the taxing power. We know of no case even suggesting the validity of such type of assessment, and counsel for respondents have suggested none. We submit that Congress has no Constitutional authority or power to delegate to or clothe any administrative agency with the right to levy this type of assessment, although we do not feel any need to argue such point, since it seems abundantly clear that Congress had no such intent and made no such delegation as claimed by respondents.

CONCLUSION.

We thus conclude that the assessment provisions of FDO 79 and 79-3 are invalid, because the Second War Powers Act does not delegate to the War Food Administrator authority to levy such an assessment and because the power to exact such an assessment, if implied, would be an invalid and unconstitutional delegation of legislative authority.

It is respectfully submitted, that in view of the gravity and importance of the question involved in this case, the fact that the question involved has not been passed upon by the Supreme Court of the United States and the great public interest in having the Supreme Court decide this question, it is clearly a case that requires review and decision by this Court.

Respectfully submitted,

WALTER AND HAVERFIELD,

By PAUL W. WALTER,

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